ROLE OF INDIAN LAWS RELATING TO MEDICAL NEGLIGENCE IN THE 21st CENTURY

PhD Research Synopsis

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CERTIFICATE

This is to certify that the work contained in this PHD synopsis entitled" Role of Indian Laws relating to Medical Negligence in the 21st Century "by Mrs. Akshita Agarwal for the fulfillment of the requirement for the Degree of Doctor of Philosophy in Faculty of Law has been carried out under the supervision of Dr. Namita Jain, Assistant Professor and Head of the Department, Faculty of Law of JECRC University, during the academic year of 2020. (And that this work has not been submitted elsewhere for a degree)

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ABSTRACT

"Health is Wealth. The term itself states how significant and valuable possession we humans possess as health. For Healthcare services we are blessed with the doctors who practice the noble and sacred profession of medical science. To carry out this profession with all the care and responsibility, doctors are bound with the Hippocratic Oath. However due to rising cases of Medical Negligence in present scenario, it seems that medical practice has become more of a commercial industry resulting into mishandling of the lives of patients who rests their belief and trust with their treating doctor. Medical Negligence is also referred to as medical malpractices. One can understand from the two words itself what medical negligence means. Treating in a negligent manner without following the standards of care causing injury or any kind of damage which thus creating civil or criminal liability is called as Medical Negligence .In this research, discussion will be made on punishable offence arising due to medical negligence under the several laws i.e., Consumer Protection Act, Indian Penal Code Act, Contract Act, Tort Act.

This research will be outlined on the factors due to which cases of medical negligence arises. Causal factors of medical negligence and legal jurisdiction surrounding it for safeguarding interest of patient is ultimately covered under Consumer Protection Act.

KEYWORDS

Healthcare, Hippocratic Oath, Medical Negligence, Medical Malpractice, Consumer Protection Act, Indian Penal Code Act, Tort Act, Contract Act

1. INTRODUCTION

Medical Negligence is the fault on which most medical malpractice cases hinge. Here's a primes on this important liability concept.

By David Goguen, J.D.

To make mistakes is inbuilt human nature. No matter how much skilled he or she may be. Medical Negligence is common synonymous term used for medical malpractice. Both terms are different terms. Not all Medical Negligence equates to a provable Medical Malpractice case. For proving it as medical malpractice case, medical negligence is just a single key element but not whole of it.

Medical Negligence solely cannot form a base for filing case or for claiming compensation. It completely depends on the damage caused to a patient and the due reason for such damage. For proving damages due to a medical malpractice, 4 things must be proved, i.e.

-Standard care

-Breach of standard care

-Direct Causation &

-Damage

Medical malpractice case (or a legally imposing medical negligence case) arises when doctor does something which other competent doctor having same skill set in same professional area would not have done and due to such kind of negligence, damage is caused to the patient who is getting treatment from the doctor.

1.1 MEDICAL NEGLIGENCE

Medical Negligence is negligently treating the suffering patient which causes damage to the patient or sometimes leads to even loss of life. Some damages are irrevocable in nature and effects of it are for lifetime. Such omission gets converted into case of medical negligence if it is done intentionally and becomes a punishable offence. Liability is calculated depending on the amount of loss occurring to the aggrieved party and further the nature of liability is decided that whether it is a civil liability or criminal liability. To sum up this, we can say that

Four D's of medical malpractice are:

- Duty
- Dereliction (Negligence or deviation from the standard card)
- Direct Causation
- Damages

STANDARD OF CARE

Standard of care in medical profession may be defined as the type of reasonable care to be taken by a medical professional during a treatment that a competent and equally skilled professional of same background would provide in the same circumstanstantial scenario for required treatment. During such treatment, medical professional is expected to treat cautiously and with the utmost prudence.

BREACH OF DUTY

When a doctor fails to provide medical standard of care while performing his duty, deliberately and due to his negligent behavior, it is considered as breach of duty.

DIRECT CAUSATION

If it is proved and claimed by the patient that the doctor's treatment is the direct reason & cause of damage that has occurred to him than it becomes a case of medical negligence.

DAMAGES

When any medical professional, deliberately, despite of his prudence commits errors leading to primary reason of damage to the patient than the doctor is held liable under the law for such damage.

1.2BOLAM TEST

Bolam Test has its origination from English tort law & is used to assess the cases of medical negligence .Under the Bolam test, to show that aggrieved has suffered due to medical negligence, he needs to prove that there was a duty of care between the doctor and the patient and the deliberate act of omission and negligence leaded to breach of duty of care.

BOLITHO TEST

In England, Bolitho Test overtook Bolam Test during the case of Bolitho v city & Hackney Health Authority. In this case it was stated that defendant doctor cannot only get away by merely proving peer doctor's similar action in a similar situation for his defense. Bolitho Test emphasizes on "Logical Analysis". Till the date in India, the Bolitho Test has been referred by the Supreme Court in only two cases.

1.3 LAWS UNDER WHICH VICTIM OF MEDICAL NEGLIGENCE CAN SEEK REDRESSAL:

CONSUMER PROTECTION ACT, 2019

The consumer protection Act, 1986 was replaced by Consumer Protection Act, 2019 by President's assent. This act came into force for providing legal aid to the suffering consumer with an effective administration.

Consumer protection act safeguards and protects the consumer in the matters of unfair practice they have dealt with.

INDIAN PENAL CODE ACT, 1860

Section 304 A of Indian Penal Code Act, 1860- This section prescribes punishments for death due to rash or negligent conduct of a person. Trial of medical practitioners has been previously done under this law.

1.4 LIMITATIONS OF THE STUDY

The study is conducted from the point of view of both patients and doctor's interest. It depicts the negligent behaviors practiced by the doctors leading to reason of damage so caused to the patient and in some cases doctors are also charged with the false accusations with an intention to gain monetarily in form of compensations.

The study has limitation due to the below mentioned reasons that are stated as follows:

-Lack of knowledge of the profession to measure the reasonability in errors caused.

-Lack of medical knowledge amongst the judiciary while passing judgments in the relating cases due to different specialization areas.

-Lack of specific laws directly dealing only with the cases of medical negligence.

- Study depends on the data only.

1.5 THE SIGNIFICANCE OF THE STUDY

The laws prevalent in India for dealing with the cases of medical negligence are inadequate. Improvisation in clinical, ethical and legal factors is required to be made. Adequate and separate laws for cases relating to medical negligence should be made.

- Perception of Patients will be studied through this research study on various responsible factors leading to cases of medical negligence.

- Suggestion for changes in medical education system by updating the curriculum.

- Awareness of the concept of medical negligence.

- Direct redressal forum for consumers (patients) facing damages due to medical negligence.

2. LITERATURE REVIEW

The most crucial step of the research is searching for relevant literature by evaluating sources to select from and finally review on the subject area in a comprehensive way. It starts in the early stage of the research process. A thorough study on the related topic is depicted through literature review.

1. BOLAM V FRIERN HOSPITAL MANAGEMENT COMMITTEE 1957

NEGLIGENCE –STATNDARD OF CARE FOR MEDICAL PRACTITIONERS

Here in this landmark case the claimant underwent through electro convulsive therapy as his medical treatment for recovery of the illness he was suffering from. The doctor here in this case by his judgment for the treatment did not gave the relaxant drugs to the claimant as here the doctor's opinion was divided opinion on the ongoing treatment. The claimant suffered from fracture as the relaxant drugs was not given to him by the doctor.

This decision was of contrary opinion of treatment with and without relaxant drugs. Treatment with relaxant drugs if they were given there would have been a very small risk of death whereas if they were not given there was very small risk of fractures. So the doctors in his opinion was acting in accordance with his practice and as per the Bolam test the doctor was not held liable for the Breach of duty on his part and did not acted in a negligent manner.

2. A case report by Dr. Rakesh Kumar, Dr. Awdhesh Kumar on medical negligence in Indian, Postoperative medical negligence leading to unnatural death.

Nowadays cases of medical negligence are immensely increasing on a huge extent. It has become one of the serious issues in India. Section 52, 80, 81, 83, 88, 90, 91, 92,304-A, 337 and 338 of Indian penal code, 1860 contains the laws related to medical malpractice in India. In this study it was found on the basis of history and examination reports of deceased, that decease was not treated on the time which lead to the death and opinion in such case was given as cause of death is "hemorrhagic" shock due to "interogenic bleeding" and delays treatment of the patient.

3. Law Commission of India: 201st Report on Emergency Medical Care to Victims on accident and during Emergency Medical Condition and Women under Labor (August, 2006)

(Pt. Parmanad Katara Vs Union of India & ors. on 28 August, 1989)

In Supreme Court a writ petition was filed in response to a news report of scooterist who died because of lack of medical treatment. It was pleaded that in medico- legal cases, the injured must be given medical aid for the purpose of saving life. In this petition, Union of India, the Medical Council of India and the Indian Medical Associates were charged as respondents.

Under article 21 of the Constitution of India, the judgment was passed that medical practitioners have an obligation to provide immediate medical aid in emergency medical conditions and also in medico-legal cases. Justice G.L. Oza also mentioned that it must be the top priority of medical professionals, police and whomsoever is involved or witnessing the incident to administer life- saving care. Utmost efforts must be made in such conditions without wasting time.

4. Miraj Medical Centre through Medical Superintendent & others Vs Sunil Tukaram Danane and Another on 15 October, 2019

In this case petitioners were held liable for the death of baby boy born to respondents.

Respondents filed a case of medical negligence for their loss. They mentioned the reason for death was improper execution of duties by the medical practitioners and lack of medical care. However, in the judgment, after taking all the materials and evidence on record, it was found that petitioner were not liable as there was no medical negligence falling on part of the doctors.

5. In the books of Constitutional Law of India- by Dr. G. Narayana Raju

This book an insight on rights prevailing with the patients dealing with Medical Negligence. These rights are however in indirect forms as right such as:

Article 21- Article 21 of the Constitution of India states about the laws relating to Protection of life and personal liberty."No person shall be deprived of his life or personal liberty except according to the procedure established by the law."

According to Bhagwati, J, Article 21" embodies a constitutional value of supreme importance is democratic society.

Article 32- It states the legal remedies for enforcement of rights.

Constitutional perspective on Right to Health Falling Under Article 32

Vincent Pankurlangara Vs Union of India, 1987

In this case the petitioner in his application under Article 32,applied for cancellation of all licenses and banning of import, export, manufacturing, sale and distribution of those drugs which are banned by the drugs consultative committee. The petitioner also pleaded to Central Government to give directions for ensuring quality, standard of drugs and termination of licenses of harmful drugs from the market.

The court's decision in the related matter was that judicial proceeding was not appropriate due to its technical and complex nature. Though the court gave directions to the concerned authorities to consider the matter and examine it. The court also gave direction as to follow proper rules and regulations to overcome the matter.

6. The Indian Penal Code, 1860

Sections 52,80,81,83,88,90,91,92,304-A,337 and 338 of the Indian Penal Code consist of laws relating Medico Legal Cases to in India.

If negligence is of civil nature, the patient only needs to prove that standard care was not taken by the doctor, whereas in the case of criminal nature, negligence must be proved gross resulting to recklessness.

7. The Consumer Protection Act, 1986

The Consumer Protection Act was enacted in 1986 for safeguarding the interests of consumer and for protection of consumer from unfair practices and means.

Under section 2(d) of Consumer Protection Act, 1986, a person is said to be a consumer if service is hired or availed for consideration. If deficiency in such hired or availed service is faced by the consumer in any respect than consumer may seek redressal under this act.

As per Section 14(1) (d) of Consumer Protection Act, 1986, it is mentioned that if consumer suffers any damage due to negligence by the opposite party, then on proving such negligence, consumer will get compensated for such damages caused to him by the opposite party.

Section 2(1)(0)of Consumer Protection Act,1986 provides for various a possible measures & provisions to deal with the cases of medical negligence stating doctors as service providers and patients as consumers.

8. The Indian Medical Council Act, 1956

A person is entitled to practice medical profession only on getting recognization by the Indian Medical Council act, 1956.The Indian Medical Council sets some regulations which are expected to be followed by the doctors mandatorily. The Regulations consist of:-

-Code of Medical Ethics,

-Responsibilities & Duties of Doctors,

-Maintenance of ethical & good medical practices,

-Maintenance of Medical Records,

-Prescription & usage of drugs with generic names.

It is also expected that the professional shall not evade with the laws related to medical field .It also states duties of doctors towards their patients, towards each other and duties to be delivered during consultancy.

If any professional misconduct or any offence is committed by a doctor than the doctor is convicted by a court of law for offences of moral turpitudes or of Criminal act.

9. **State of Haryana & Others Vs Smt. Santra on 24 April, 2000**

In this case, there was failure of sterilization operation. Under "Sterilization scheme", the operation was performed on (Plaintiff's name) Smt. Santra successfully and she was also issued certificate with signatures of Medical officer, General Hospital Gurgaon. Even after the operation, she conceived and she was told by the hospital that she is not pregnant.

Complete sterilization process was not done. Only her right fallopian tube was operated and her left fallopian tube was not even touched.

As she already had 7 children ,1 more child's upbringing was not affordable for her .Under these circumstance she filed a suit of medical negligence .In Supreme court's judgment the involved doctors and state was held liable for the damages and also the court entitled Smt. Santra to get compensated till the child reach the age of puberty.

10. **In the case of Poonam Verma Vs Ashwin Patel and others**1996**, AIR2111**

A doctor registered as a Homeopathic practitioner was giving allopathic treatments.Patient died in this case because of allopathic treatments by the doctor (which was not appropriate to be given by the doctor registered with other specialization area, as per the direction of medical council).

The Supreme Court held the doctor guilty and also mentioned that it was case of “negligence per se’ where the act of practicing other than the registered practice applies. The doctor can practice in the field or area in which he has been awarded with the degree and practicing other than that leads to trespassing into prohibited field.

3. STATEMENTS OF PROBLEM AND OBJECTIVES OF STUDY

"ROLE OF INDIAN LAWS RELATING TO MEDICAL NEGLIGENCE IN THE 21st CENTURY"

BROAD OBJECTIVES:

The study will cover the following research objectives:

- RO1: To study awareness in society regarding medical negligence laws.
- RO2: To investigate into the judiciary system.
- RO3: To study the consequences due to medical negligence.
- RO4: To analyze correct measure to prove the claims of medical negligence.
- RO5: Awareness about legal rights and judicial approach.
- RO6: To go through penalty system overviews and estimation methods of doctors liabilities in cases of medical negligence.
- RO6: To overcome the grey areas of errors in judgments due to the nature of defining parameters for measurements.

3.1 RESEARCH QUESTIONS

The study will focus of following questions:

- What is the nature and meaning of medical negligence and what elements constitute it?
- Judicial approach to the issue/ trial regulation for the concerning matters?
- What are legal liabilities of Doctors for medical negligence?
- Emergency medical treatments in medico legal cases.

4. RESEARCH METHODOLOGY

Research Methodology is insightful and systematically organized process for conducting research in order to gain new knowledge about the problem for which the researcher is looking for. Here, for conducting the research, Doctorial Research/Traditional/Non-Emperical Research Methodology is best suited .Research here is purely based on provided Laws under the Acts on :The Indian Penal code Act,1860,The Indian Medical Council Act,1956,The Consumer Protection Act ,1986,The Constitutional Laws in India ,Case Laws and Case Studies ,Journals ,Internet, Newspapers, Articles and Reports.

4.1 RESEARCH APPROACH

In Research Approach, where the decision of procedures of enquiry done, methods of data collection, analysis and interpretation are to be done, keeping in mind of the research problem area, Doctorial approach is best suited.

Apart from data collection through sources of medical reports and other reports, various books, sources of news, law journal etc. are also studied to set up the protocol for proper order wise conduction of the research.

Questionnaires will be formed at later stage to gain perspectives of doctors, other related person in medical field, patients and public in general.

4.2 RESEARCH DESIGN

Research Design is the basic framework of techniques and research method chosen for conducting research in a sequence and order wise manner. This design is opted as per the suitability of the subject area of research. The research is analytical and descriptive in nature .The research work conducted will not be exhaustive and conclusive as there is lot of scope for further study on emerging dimensions in the area of medical negligence .

4.3 NATURE AND SOURCES OF DATA

The research will be conducted by extraction of various sources of data. Secondary data will be collected from these sources:-

- Through the medium of Internet Information on the related subject area.
- Medical reports, Articles and various books on law.
- Newspapers, Law Journals, Research Papers, Case Studies etc.

4.4 DATA COLLECTION

The data collected by the scholar for conducting the research are in the form of articles, case studies, newspapers, and books etc., medical reports and through other forms. Analysis of the collected data will be done through several techniques and tools for attaining and fulfilling the research objectives.

4.5 HYPOTHESIS OF THE STUDY

- H0: Improvisation of remedial system in laws relating to medical negligence for timely judicial intervention.
- H1: Accurate calculation techniques of compensation in the cases of Gross Negligence.

- H2: Rules and laws for employment of qualified person in hospital and clinical establishments.

- H3: Whether any proceedings are bought in time and deciding limitation of time for action of damages.

5. PROPOSED/ EXPECTED OUTCOMES OF THE RESEARCH

In order to overcome the errors of medical negligence, there is a need to update the training procedures and to set up specific standards to qualify for students studying medicine.

1. Keeping in mind there is also the need to safeguard the interest of doctors to protect them from false cases.

2. Update in the curriculum of the medicine studies in areas of degrees in fields of allopathy, homeopathy, ayurveda etc.
3. Rule of regular check by invigilators & maintenance of records in the hospitals and clinical establishments.

4. Establishment of law dealing specifically with the cases of medical negligence for time restraint judicial process and legal remedies.

5. Ascertainment of elements to decide whether medical negligence case is there or not.

6. A review on existing system & laws dealing with the cases of medical negligence.

6. NOTES

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